NO. 84379-1

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the

GUARDIANSHIP OF SANDRA LAMB

DSHS RESPONSE TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ROBERT M. MCKENNA
Attorney General

JONATHON BASHFORD
Assistant Attorney General
WSBA #39299
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6535

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Amicus Curiae ACLU miscomprehends the nature of guardianships when it argues that a guardian takes over every personal right of an incapacitated person. Washington's guardianship statute does not provide, and the Constitution does not allow, for a court to determine a person incompetent to speak her own mind. ACLU compounds that error by searching for a compensation standard that might support the Hardmans' request for fees in this case. The tests suggested by ACLU are unsupported by case law and unwise as a matter of policy. Under any reasonable standard, the superior court did not abuse its discretion by denying the Hardmans' fees based on the record in either *Lamb* or *McNamara*.

II. ARGUMENT

A. An Incapacitated Person Retains Rights Not Subject To A Guardian's Substituted Decision Making

A guardian is not a spokesperson, a lobbyist, or a literal alter ego of the ward. Guardianships provide vulnerable persons with the ability to make legally competent decisions in areas where the person's own judgment would be legally void.

The fundamental reason for a guardianship is the inability of the ward to make decisions for herself. *See* RCW 11.88.010(1)

("demonstrated inability to adequately provide for nutrition, health, housing, or physical safety" or "adequately manage property or financial affairs"). For example, a contract is void or voidable if signed by a person who lacks the ability to understand the nature and effect of her act. *E.g.*, *Peterson v. Eritsland*, 69 Wn.2d 588, 594, 419 P.2d 332 (1966). Similarly, a non-emergency medical procedure conducted on a person who cannot give knowing consent is assault. *E.g.*, *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967); RCW 7.70.030(3). If a person clearly lacks capacity to make knowing decisions, landlords will not lease; bankers will not withdraw; and doctors will not operate.

The legislature intends guardianships to close that gap by providing assistance to those who cannot exercise legal rights on their own. RCW 11.88.005. A guardian thus exercises competent judgment to enter contracts, RCW 11.92.140, give informed consent, RCW 11.92.043(5), and other important decisions that would lack legal effect if the incapacitated person attempted to make the decision herself. *E.g.*, RCW 11.92.040(4) (finances), .043(4) (residence and education). But other important decisions are, for reasons of history or personal dignity, not among the guardian's enumerated duties and thus left entirely to the individual. For example, a person who lacks the individual capacity to knowingly enter into a marriage does not confer that decision to her

guardian, but simply loses the practical opportunity to exercise that fundamental right. *See In re Gallagher's Estate*, 35 Wn.2d 512, 518-21, 213 P.2d 621 (1950); RCW 26.04.130. A guardian likewise has no power to substitute his judgment for his ward's in order to execute or amend the incapacitated person's will. RCW 11.12.010 (only "person of sound mind" may execute a will); *see Toler v. Murray*, 886 So.2d 76, 78-79 (Ala. 2004) (guardian cannot execute a will); *Matter of Jones*, 379 Mass. 826, 401 N.E.2d 351, 356-358 (Mass. 1980) (same).

Against that background, ACLU would have this Court transform guardians into spokespersons. ACLU repeats its general claim that the personal rights of an incapacitated person, "to have any meaning at all, must be exercised by duly-appointed guardians." Supp. ACLU Br. at 15.[1] The U.S. Supreme Court held otherwise in the very case ACLU relies on, *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990). In *Cruzan*, state law provided that only Ms. Cruzan herself could make the decision to forego life support, even though she was in a persistent vegetative state and her court-appointed guardians thought that the removal of life support was in her best interest. 497 U.S. at 267-69. The Court noted that because Ms. Cruzan lacked any

[1] ACLU made a similar argument at greater length in its amicus brief to the Court of Appeals in this case. While we briefly treat the issue here, DSHS's response to the first ACLU amicus brief provides additional argument. *E.g.*, DSHS Resp. to ACLU Ct. of Appeals Br. at 5-8.

ability to actually make such a decision herself, practically the right would only be exercised if the state allowed the decision to be made "by some sort of surrogate." *Cruzan*, 497 U.S. at 280. Yet the Court held that the state need not "repose judgment on these matters with anyone but the patient herself", including her guardian or her parents. *Id.* at 286. Similarly, there is no need to repose expressive judgment in someone other than Ms. Lamb herself. The courts have no power to find an individual incompetent to exercise her own judgment as to her political beliefs, or whether or how to express them.

B. An Incapacitated Person Is Still Allowed Her Own Opinions And Expression

ACLU argues that substituted exercise of an individual's political and expressive judgment must be within a guardian's powers, emphasizing that "the Hardmans are the *full* guardians of severely disabled individuals." Supp. ACLU Br. at 11. ACLU misunderstands the term "full guardianship" which is a legal term of art. A person who is found to be fully incapacitated as to "nutrition, health, housing, [and] physical safety" under RCW 11.88.010(1)(a) and as to "property or financial affairs" under RCW 11.88.010(1)(b) is not therefore legally incapacitated in every way. A person who is fully incapacitated with respect to financial and medical matters may still be competent to make other legal decisions

such as executing a will. *See In re Estate of Bottger*, 14 Wn.2d 676, 685, 129 P.2d 518 (1942); *Pope v. Fields*, 273 Ga. 6, 536 S.E.2d 740, 743 (Ga. 2000). And a person may certainly be subject to a full guardianship yet retain the ability and the right to speak her mind, even if her beliefs or her expression are something other than what her guardian determines to be in her objective best interests.

Nothing about a finding of legal incapacity under Chapter 11.88 RCW supports ACLU's assumption that a person with a guardian has no individual ability to exercise her own self-expression. *See* DSHS Resp. to ACLU Ct. of Appeals Br. at 11-16. ACLU reads too much into a guardian's authority in the context of end-of-life care. Supp. ACLU Br. at 6 n.4; at 14-15. The decision to decline medical treatment on the ward's behalf is part of a guardian's commonplace authority to provide informed consent. *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984). That medical decision-making authority flows directly from statute, not from some plenary power of the guardian. RCW 11.92.043(5). ACLU urges the Court to read the statute in a manner that provides a guardian with expansive authority to substitute for the ward unless the legislature explicitly limits that authority. Supp. ACLU Br. at 14. That analysis is directly contrary to the legislative intent of the guardianship statute. RCW 11.88.005 ("liberty and autonomy should be

restricted through the guardianship process only to the minimum extent necessary to adequately provide for [the ward's] health or safety, or to adequately manage their financial affairs").

ACLU argues that failure to compensate the Hardmans "devalues constitutionally-protected participation in the political process" by those most interested in the outcome, Supp. ACLU Br. at 6—presumably referring to Fircrest residents rather than the Hardmans themselves. They fear that failure to pay guardians to take political positions on behalf of their wards "would preclude *any* individual participation in the political process by the incapacitated[.]" Supp. Br. of ACLU at 9. Later ACLU states that the Hardmans' activities "provided [Sandra Lamb] with a direct benefit in the form of ensuring that *her individual voice* was heard[.]" Resp. Br. of ACLU at 10. ACLU's argument treats incapacitated persons as if they were legal fictions rather than living human beings—as if they, like corporations, have only the views ascribed to them by their guardians, and can speak only through others.

ACLU's description of the Hardmans as giving dignity to Ms. Lamb's individual voice is simply unsupported by the record in this case. Ms. Lamb is not attempting to involve herself in the political process, with necessary assistance rendered by her guardians. Her individual voice, to the extent she has tried to express it, has been drowned

out by the Hardmans' own determination of the "collective" interests of all Fircrest residents. While ACLU does not discuss the *McNamara* case, the record in that case is equally barren of any indication of those individuals' views. A guardian could certainly be entitled to reasonable compensation for assisting a ward who wishes to express herself politically or otherwise, for instance by arranging for accessible transportation or assistive technologies. But for an individual with no desire to engage in self-expression, the guardian has no authority to force expression on her by speaking in her stead.

C. ACLU's Proposed Tests For Guardian Compensation Are Ill-Defined And Unworkable

ACLU argues that guardians in general, and the Hardmans in particular, are entitled to compensation for political advocacy. They are wrong on both counts. Moreover, their arguments ignore that the fees sought by the Hardmans are not for advocating on behalf of a particular individual, but organizing a political campaign on behalf of a collective with different interests and, presumably, different viewpoints.

1. ACLU fails to consider the implications of court-controlled lobbying.

Leaving aside the lack of historical or statutory support for guardians to act as political spokespersons, such a role would raise serious policy concerns. *See generally* DSHS Resp. Br. in *Lamb* at 21-24.

ACLU's argument only serves to highlight those problems. According to ACLU, courts need only "determin[e] whether political advocacy by a guardian on behalf of a ward is undertaken in the best interests of the ward." Supp. ACLU Br. at 10. That is, if the ward failed to express a political opinion the courts would make an objective determination of what political position is in the ward's best interests and compensate the guardian for expressing that opinion on the ward's behalf. Such an inquiry would be farcical in light of the inherent subjectivity of political belief, and would inject the courts directly into litigating what is or is not rational policy. The guardian is an officer of the court appointed to assist the court in its duty to safeguard the ward's well-being, so paying guardians to advocate in favor of a particular political position amounts to political advocacy by the court itself. Because fee awards are generally left to the discretion of the superior court, there is a tremendous risk of political expenditures from a ward's estate being driven not just by the political views of guardians, but also by the political beliefs of the court. The law should not be construed as requiring courts to go down that path.

2. ACLU fails to consider how courts and guardians would engage in political advocacy for diverse interests at once.

Even if courts could make substituted political decisions on an individual basis, the collective advocacy for which the Hardmans seek

compensation renders individual inquiries impossible. For instance, in 2008 and 2009 the Hardmans lobbied Shoreline City Council to change the zoning of Fircrest to prevent a state plan to sell a portion of that land to developers for housing development. McNamara CP at 195; Lamb CP at 141-143. Their reason for opposing the project was danger to Fircrest residents from increased traffic and high-density housing near some of the cottage-style homes on the Fircrest campus. McNamara CP at 195; Reply Br. in McNamara at 9. Yet those dangers, even if true, seem unlikely to apply to an individual like Richard Milton, who lives in the nursing facility rather than the cottages, and who is non-ambulatory and "bound by protective devices." McNamara CP at 282, 305. In fact, the proceeds from the land sale would have allowed the state to replace the 45 year-old nursing facility where Mr. Milton resides. McNamara CP at 271.

For guardians such as the Hardmans trying to coordinate an effective grassroots campaign, choosing a position on such a project requires choosing between the best interests of their diverse wards—those who are ambulatory and might be in danger from increased traffic, versus those who are bedridden and might benefit from a state-of-the-art facility. That is a traditional legislative inquiry, not the kind of neutral judicial inquiry that ACLU envisions. But for the Hardmans, whose goal is

"collectively advocating for all of [their wards] as their political voice," Lamb CP at 141, such conflicts are certain to arise.

3. ACLU does not provide a single example in the record where the Hardmans should have been paid additional fees.

ACLU argues specifically that the Hardmans should be compensated for providing Sandra Lamb with a "direct benefit" to the extent they spent time lobbying against certain 2007 legislation. Supp. ACLU Br. at 10.[2] Their argument fails for a number of reasons. First, the Hardmans' fees for services provided to Ms. Lamb in 2007 are not at issue in this appeal.[3] Second, for the six individuals for whom fees

---

[2] ACLU cites to the decision below in *Guardianship of Lamb*, 154 Wn. App. 536, 540-541, 228 P.3d 32 (2009), which states "the Hardmans opposed legislation . . . that would have created a commission with authority to close [Residential Habilitation Centers]." *Lamb*, 154 Wn. App. at 541. That description of proposed legislation comes from the Hardmans' advocacy reports. *E.g.*, Lamb CP at 47-48. The reference appears to be to House Bill 1584 and Senate Bill 6013. Those bills would have created a commission to gather "independent evidence-based facts" about state-run institutions in order to make recommendations "regarding consolidation, expansion, reduction, closure, replacement, or retention of [the] institution[s]." H.B. 1584, 60th Leg. Reg. Sess. (Wash. 2007); S.B. 6013, 60th Leg. Reg. Sess. (Wash. 2007).

[3] ACLU appears to confuse the fee advances at issue in *Lamb* with the approved fees for past services at issue in *McNamara*. In *Lamb* the Hardmans' fees for 2005 through 2008, including fees for the specific lobbying referenced by ACLU, were approved by the superior court without challenge from DSHS and "were not an issue in the case." Lamb CP at 201, ln. 18; DSHS Resp. Br. in Lamb at 9 n.8. The fees that are at issue in Ms. Lamb's case are a forward-looking allowance for the 2008 through 2011 period, still "subject to . . . future [superior] court approval." Lamb CP 204; *see* RCW 11.92.180 (guardians may collect an advance allowance). Whatever the necessity or benefit to Ms. Lamb of what the Hardmans did in 2007, and whatever that may have to say about what their reasonable allowance ought to be going forward, the Hardmans clearly cannot collect additional fees for their 2007 activities.

In contrast, in the consolidated case *Guardianship of McNamara* the issue is whether the superior court abused its discretion in approving the Hardmans' requested fees at the end of a 2006 through 2009 reporting period.

from that time period are at issue, those in the *McNamara* case, the record clearly contains sufficient evidence to support the superior court's conclusion that they received no benefit from that lobbying. McNamara CP at 272, 1942, 2029, 2119, 2215 (declarations from Fircrest nursing home administrator stating that McNamara, Schmidt, MacKenzie, Moser, and Milton would not suffer permanent harm from being moved from Fircrest); McNamara CP at 1111 (declaration from physician stating that Werlinger would experience "no or minimal negative effects" if relocated).

Third, if those fees for Ms. Lamb had been at issue, the Hardmans' block billing renders review of the reasonableness of their fees impossible. Even assuming that the superior court had determined that the 2007 legislation was objectively contrary to Ms. Lamb's best interests and should be opposed, it is impossible on this record to determine what amount of the Hardmans' time was necessary in order to secure the beneficial result. By failing to provide any particularized hourly billing the Hardmans failed to meet their burden to provide adequate evidence to support their fee requests. *Disque v. McCann*, 58 Wn.2d 65, 69, 360 P.2d 583 (1961).

D. ACLU Misstates The Guardian Compensation Standard Articulated By DSHS, The Court Of Appeals, And The *Larson* Court

ACLU misstates DSHS's position as being that a guardian may only be compensated for activities that "advance the ward's economic interest." Supp. ACLU Br. at 7. Nothing in the necessary-and-beneficial test articulated by DSHS restricts the benefit to economic benefit. Customary guardianship services such as medical decision-making and determining an appropriate care plan provide benefits directly to the individual ward; a guardian is clearly entitled to compensation under RCW 11.92.180 for the hours of service reasonably necessary to provide those benefits.

Nor is ACLU correct to pigeon-hole the *Larson* test[4] as being "the probate attorney's fees standard." Supp. ACLU Br. at 15. The probate fee statute, RCW 11.48.210, is the same for both attorneys and personal representatives. Both are entitled to "just and reasonable" compensation,

---

[4] *In re Estate of Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985), states the test for probate attorney fees as:

> the court should consider the amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the value of the estate, the novelty and difficulty of the legal questions involved, the skill and training required in handling them, the good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance.

Larson, 103 Wn.2d at 522 (quoting *In re Estate of Peterson*, 12 Wn.2d 686, 123 P.2d 733 (1942)).

as are guardians under RCW 11.92.180. This Court has applied the test in cases involving both personal representative and attorney fees, without distinguishing between fees for attorney and personal representative services. *In re Estate of Merlino*, 48 Wn.2d 494, 496-498, 294 P.2d 941 (1956). Both the lower courts and the Certified Professional Guardianship Board have found the clarity of the RCW 11.48.210 standards to be useful in determining reasonable guardian compensation under RCW 11.92.180. *In re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007); CPG Board, Ethics Advisory Opinion #2002-0001 (May 12, 2003).[5]

III. CONCLUSION

A guardianship would not be well-suited as a vehicle for substituted political expression even if such an arrangement were constitutional and contemplated by the statute. Unlike the amorphous standard proposed by the Hardmans and seconded by ACLU, the standards developed in the context of probate fiduciaries provide clear and direct guidance to allow lower courts to determine what fees guardians may charge. Under any reasonable standard, the superior court did not

[5] Available online at the CPG Board website, http://www.courts.wa.gov/committee/?fa=committee.display&item_id=640&committee_id=127 (last visited June 17, 2011).

abuse its discretion in denying the Hardmans' fee requests in either *Lamb* or *McNamara*.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.

ROBERT M. MCKENNA
Attorney General

JONATHON BASHFORD, WSBA #39299
Assistant Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6535

NO. 84379-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of the Guardianship of:

SANDRA LAMB, et al.

CERTIFICATE OF SERVICE

I certify that on June 17, 2011, I served a true and correct copy of the DSHS RESPONSE TO SUPPLEMENTAL BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON on all parties or their counsel of record, by U.S. Mail with first class postage prepaid and by e-mail PDF attachment, addressed as follows:

Michael L. Johnson
Hardman & Johnson
93 S. Jackson St. - #55940
Seattle, WA 98104-2818
Email: hardmanjohnson@gmail.com

Emily Rebecca Cooper Pura
Disability Rights Washington
315 5th Ave. S., Ste. 850
Seattle, WA 98104-2691
Email: **emilyp@dr-wa.org**

Alfred A. Day
Ropes & Gray LLP
800 Boyleston Street
Boston, MA 02199
Email: **alfred.day@ropesgray.com**

Nancy Lynn Talner
Sarah A. Dunne
ACLU of Washington
901 Fifth Avenue, Ste. 630
Seattle, WA 98164
Email: **dunne@aclu-wa.org**
talner@aclu-wa.org

Laura Jean Beveridge
Attorney at Law
133 Lexington Avenue #2
Cambridge, MA 02138
Email: **laura.beveridge@comcast.net**

Julian Wheeler
Attorney at Law
1201 NE fifty Second St No 7
Seattle, WA 98104
Email: julianfwheeler@aol.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of June 2011 at Tumwater, WA.

Cheryl Chafin, *Legal Assistant*